

STATE OF MICHIGAN  
IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC,

Supreme Court No. 153979

Plaintiff/Cross-Defendant/Appellant,

Court of Appeals No. 326486

v

Sanilac County Circuit  
No. 14-035490-CH

VAN DYKE SC PROPERTIES, LLC,

Defendant/Cross-Plaintiff/Appellee.

---

**APPELLEE'S BRIEF OF VAN DYKE SC PROPERTIES, LLC**

**ORAL ARGUMENT REQUESTED**

John J. Bursch (P57679)  
BURSCH LAW PLLC  
9339 Cherry Valley Ave SE, #78  
Caledonia, Michigan 49316  
(616) 450-4235  
[jbursch@burschlaw.com](mailto:jbursch@burschlaw.com)

David A. Keyes (P43917)  
KELLY LAW FIRM  
627 Fort Street  
Port Huron, Michigan 48060  
(810) 987-4111

*Attorneys for Van Dyke SC  
Properties, LLC*

Dated: July 27, 2017

## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents .....	i
Index of Authorities .....	iii
Statement of Jurisdiction .....	vi
Statement of Questions Presented .....	vii
Introduction.....	1
Background.....	3
I.    Prescriptive easements.....	3
II.   Development of the car wash and shopping plaza .....	6
III.  B&J sells the car wash .....	6
IV.  Auto Wash’s lease and purchase of the car wash.....	7
V.    Van Dyke’s purchase of the shopping plaza .....	9
VI.  The dispute .....	9
Proceedings Below.....	10
I.    Trial Court proceedings.....	10
II.   Court of Appeals proceedings.....	11
Standard of Review .....	13
Argument.....	13
I.    Creation of a prescriptive easement requires (1) a property owner with the right to claim the easement, and (2) legal action. Neither prerequisite is met here.....	13
A.    B&J never had the right to claim a prescriptive easement. ....	13
B.    B&J never took legal action to claim a prescriptive easement.....	20

II.	Auto Wash's rejection of its responsibilities to repair and maintain the easement is a rejection of the easement itself. Alternatively, and at a bare minimum, Auto Wash must share in the maintenance costs going forward. ....	27
III.	A postscript about preservation .....	28
	Conclusion and Relief Requested .....	29

## INDEX OF AUTHORITIES

Cases	<u>Page(s)</u>
<i>Banach v Lawera</i> , 330 Mich 436; 47 NW2d 679 (1951).....	4
<i>Barbaresos v Casaszar</i> , 325 Mich 1, 8; 37 NW2d 689 (1949).....	15
<i>Beechler v Bylerly</i> , 302 Mich 79, 83; 4 NW2d 475 (1942).....	22
<i>Berkey &amp; Gay Furniture Co v Milling Co</i> , 194 Mich 234; 160 NW 648 (1916).....	22
<i>Bowen v Buck &amp; Fur Hunting Club</i> , 217 Mich App 191; 550 NW2d 850 (1996).....	5, 27
<i>Churches v Ruttman</i> , 2006 WL 1360393, at *2 (Mich Ct App, May 18, 2006).....	14
<i>Clayton v Jensen</i> , 214 A2d 154 (Md, 1965).....	24
<i>Cole v Bradbury</i> , 29 A 1097 (Me, 1894).....	24
<i>Crew's Die Casting Corp v Davidow</i> , 369 Mich 541; 120 NW2d 238 (1963).....	4, 19
<i>Delaney v Pond</i> , 350 Mich 685; 86 NW2d 816 (1957).....	19
<i>Fesperman v Grier</i> , 313 So 2d 525 (Ala, 1975).....	24
<i>Gorte v Dep't of Transp</i> , 202 Mich App 161, 168; 507 NW2d 797 (1993).....	passim
<i>Haab v Moorman</i> , 332 Mich 126, 144; 50 NW2d 856 (1952).....	22, 23
<i>Harvey v Crane</i> , 85 Mich 316; 48 NW 582 (1891).....	27

	<u>Pages(s)</u>
<i>Hopkins v Parker</i> , 296 Mich 375; 296 NW 294 (1941).....	15, 17
<i>Johnson v Debusk Farm, Inc</i> , 636 SE2d 388 (Va, 2006).....	24
<i>Killips v Mannisto</i> , 244 Mich App 256, 259; 624 NW2d 224 (2001).....	passim
<i>Marr v Hemenny</i> , 297 Mich 311; 297 NW2d 504 (1941).....	4
<i>Matthews v Dep't of Nat Resources</i> , 288 Mich App 23, 37; 792 NW2d 40 (2010).....	passim
<i>Milewski v Wolski</i> , 314 Mich 445; 22 NW2d 831 (1946).....	16
<i>Moore v White</i> , 159 Mich 460; 124 NW 62 (1909).....	27
<i>Mumrow v Riddle</i> , 67 Mich App 693, 698; 242 NW2d 489 (1976).....	4
<i>O'Conoor v Brodie</i> , 454 P2d 920 (Mont, 1969).....	24
<i>People v Knight</i> , 473 Mich 324, 328; 701 NW2d 715 (2005).....	13
<i>Reed v Soltys</i> , 106 Mich App 341; 308 NW2d 201 (1981).....	16
<i>Sallan Jewelry Co v Bird</i> , 240 Mich 346; 215 NW 349 (1927).....	23
<i>Siegel v Renkiewicz</i> , 373 Mich 421, 425; 129 NW2d 876 (1964).....	22
<i>Smith v Dennedy</i> , 224 Mich App 378; 194 NW 998 (1923).....	23
<i>Smith v Foerster-Bolser Const, Inc.</i> , 269 Mich App 424, 427; 711 NW2d 421 (2006).....	28

	<u>Pages(s)</u>
<i>Steward v Panek</i> , 251 Mich App 546, 554; 652 NW2d 232 (2002).....	28
<i>Stewart v Hunt</i> , 303 Mich 161; 5 NW2d 737 (1942).....	5
<i>Widmayer v Leonard</i> , 422 Mich 280; 373 NW2d 538 (1985).....	5
<i>Wilkinson v Hutzel</i> , 142 Mich 674, 676–677; 106 NW 207 (1906).....	16
<i>Williamson v Crawford</i> , 108 Mich App 460, 464–465; 310 NW2d 419 (1981).....	14
<i>Worden v Assiff</i> , 317 Mich 436, 439; 27 NW2d 46 (1947).....	16
<i>Wortman v Stafford</i> , 217 Mich 554; 187 N 326 (1921).....	22

## Rules

MCR 7.301.....	vi
----------------	----

## Other Authorities

1 Cameron, <i>Michigan Real Property Law</i> § 6.4, p 214 (3d ed 2005).....	passim
---	--------

## STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.301(B)(1) and the Court's Order of March 22, 2017, granting Marlette Auto Wash LLC's Application for Leave to Appeal.

## STATEMENT OF QUESTIONS PRESENTED

1. Whether the open, notorious, adverse, and continuous use of property for at least 15 years creates a secret prescriptive easement that is an easement appurtenant, without regard to whether the owner of the dominant estate took legal action to claim the easement.

The Sanilac County Circuit Court answered: Yes.

The Court of Appeals answered: No.

Marlette Auto Wash, LLC, answers: Yes.

Van Dyke SC Properties, LLC, answers: No.

2. Whether a party can claim the right to a prescriptive easement over unenclosed, mutually-used property without satisfying the heavy burden of showing that its use was adverse and hostile.

The Sanilac County Circuit Court failed to answer this question.

The Court of Appeals had no need to answer this question.

Marlette Auto Wash, LLC, failed to answer this question.

Van Dyke SC properties, LLC, answers: No.

3. Whether, when an easement is used jointly by the owners of the dominant and servient tenements, the owner of the dominant tenement must maintain the easement and pay costs in proportion to its use.

The Sanilac County Circuit Court failed to answer this question.

The Court of Appeals had no need to answer this question.

Marlette Auto Wash, LLC, failed to answer this question.

Van Dyke SC properties, LLC, answers: No.

## INTRODUCTION

Plaintiff Marlette Auto Wash, LLC, claims a vested property right in a prescriptive easement purportedly giving Auto Wash the ability to use Defendant Van Dyke SP Properties, LLC's parking lot as an ingress to and egress from Auto Wash's truck bays. Although Auto Wash has not used the parking lot for the necessary 15 years to acquire such an easement, it argues that the easement was established through use by a previous, unrelated owner of Auto Wash's property (coincidentally, the current owner of the parking lot). For good measure, Auto Wash steadfastly refuses to share any of the costs for maintaining the parking lot it now uses.

Auto Wash's claim fails for three reasons. *First*, the Court of Appeals correctly (and unanimously) recognized that a "person claiming a prescriptive easement must acknowledge or act on the purported acquired right" or the easement does not come into existence. Slip Op, p 3 (citing *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993)). And as the Real Property Law Section explained in its *amicus* brief at the application stage, this Court should affirm that holding. Unless a party claiming a prescriptive easement takes legal action, a court of law will never have determined that all the elements of a prescriptive easement were met. Real Property Law Amicus Br, p 12. And without that determination, there can be no property right at all. *Id.*

Auto Wash's contrary rule would wreak havoc on Michigan property law. Consider an individual who owns lot A and engages in an adverse and hostile use of neighboring lot B as a driveway easement for 15 years and one day. On the following day, the lot B owner grants permission for A to use the driveway ease-

ment. Over the ensuing decades, the owner of each lot changes three times, with the owners of lot B continuing to grant permission for the lot A owners to use the driveway. Fifty years following the grant of permission, the present lot A owner discovers an octogenarian who remembers how his friend, the original lot A owner, used the lot B driveway for 15 years and a day without permission. Although the lot A owner had no expectation of a permanent easement, and the lot B owner had no notice of such a claim, the lot A owner now claims a secret prescriptive easement over lot B. And the lot B owner would have no practical ability to defend against that claim for a secret easement, because the octogenarian is the only living witness. That is not how Michigan's chain-of-title scheme is supposed to work.

Second, the party claiming a prescriptive easement bears the burden of demonstrating its entitlement by clear and cogent evidence. Slip Op, p. 2 (citing *Matthews v Dep't of Nat Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010)). That burden is even higher when the land over which the easement is claimed is unenclosed and subject to mutual use with the owner of the subservient parcel, as was the case with the parking lot at issue here. Yet the trial court made no factual finding whatsoever that Auto Wash's predecessor's use of the parking lot was notorious and adverse to the parking-lot owner, nor could it have done so. The only record evidence is that the use was mutual and permissive. So even if a prescriptive easement can vest in secret, without any action by the party who could have claimed such an easement, Auto Wash has failed to establish as a matter of law that B&J Investment was entitled to such an easement in 2005.

Finally, it is well-settled in Michigan that when an easement is used jointly by the owners of the dominant and servient tenements, the owner of the dominant tenement must take care of easement maintenance and pay its proportional share of those costs. Yet when Van Dyke asked Auto Wash to pair its fair share of the costs associated with maintaining the parking lot, Auto Wash flatly refused. In such circumstances, equity demands that Auto Wash's claim to a secret prescriptive easement be denied.

For each of these three, independent reasons, Van Dyke respectfully requests that the Court affirm the Court of Appeals and deny Auto Wash's claim for a secret prescriptive easement. Alternatively, the Court should simply deny Auto Wash's Application for Leave to Appeal.

## BACKGROUND

### I. Prescriptive easements

Michigan law recognizes two kinds of easements, "appurtenant" and "in gross." An easement appurtenant benefits a parcel of land (the dominant estate) by burdening another parcel (the servient estate). Because an easement appurtenant is connected to the use or enjoyment of the dominant parcel, the easement generally passes with the benefited property when the property is transferred to another owner. 1 Cameron, *Michigan Real Property Law* § 6.4, p 214 (3d ed 2005) [hereinafter, "Cameron"]. An appurtenant in gross is granted to a particular person, is personal, and generally cannot be transferred. *Id.* § 6.4, p 215. A prescriptive easement is generally an easement appurtenant. *Id.* § 6.11, p 226.

A prescriptive easement can arise when a person lacking possession uses the land of another in a particular way without permission for a minimum of 15 years. 1 Cameron § 6.11, p 226. Such use “must be *adverse*, under claim of right, continuous (i.e., uninterrupted), open, notorious, peaceable, and with the actual or presumed knowledge or acquiescence of the owner of the servient tenement. *Id.* (emphasis added, citing *Marr v Hemenny*, 297 Mich 311; 297 NW2d 504 (1941)).

The standard for proving adverse use is extraordinarily high. “Adverse or hostile use” requires “use inconsistent with the right of the owner, without permission asked or given, *use such as would entitle the owner to a cause of action against the intruder.*” 1 Cameron, § 6.11, p 227 (emphasis added, quoting *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976)). As a result, the “owner’s permission, before or during the prescriptive period, will, even if given orally, turn a potential prescriptive easement into a license, since it destroys the adverse nature of the use.” *Id.* (citing *Banach v Lawera*, 330 Mich 436; 47 NW2d 679 (1951)). Permission “will ordinarily not ripen into prescription,” *id.*, and may be revoked, *id.*

Permissive *mutual* use of an area with the owner cannot mature into a prescriptive easement until the mutuality has ended and the hostile, adverse use begun. 1 Cameron, § 6.12, p 228 (numerous citations omitted). And a party claiming the right to a prescriptive easement has a particularly “heavy” burden when the land at issue is unenclosed, *id.* (numerous citations omitted), as is the case here with the parking lot. An easement’s scope may also not be expanded, for example, from an automobile ingress/egress to a truck ingress/egress. *Id.* § 6.23, p 235 (citing *Crew’s Die Casting Corp v Davidow*, 369 Mich 541; 120 NW2d 238 (1963)).

As noted above, the burden for proving a prescriptive easement is on the party claiming it, 1 Cameron, § 6.17, p 230 (citing *Stewart v Hunt*, 303 Mich 161; 5 NW2d 737 (1942), though the burden of production may shift if a use has continued for 50 years or more, *id.* (citing *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985)). Once proven, the owner of the dominant estate must pay his *pro rata* share of maintenance costs for the easement. *Id.* § 6.24, p 237 (citing *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191; 550 NW2d 850 (1996)).

Michigan allows a user to “tack” his prescriptive period to a predecessor in title, but only if each party in the chain of title enjoys privity of estate shown either by “(1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance.” Slip Op, p 2 (quoting *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001)).

As explained below, Auto Wash is wrong in its assertion that a prescriptive easement can vest without any action by the owner of the dominant estate, i.e., the property benefitted by the easement. But this Court need not even reach that question because the trial court failed to make any finding of fact that Auto Wash’s thrice-removed predecessor-in-interest, B&J Investment, used the parking lot for 15 consecutive years in a way that was adverse and hostile to the parking lot’s then-owner. In fact, the trial court *could not* make such a finding, because the only record evidence is that B&J Investment had permission to use the parking lot. 11/21/14 Trial Tr, pp 32–34, Appellee’s Appendix 27b-29b (hereinafter “App. -b”).

## II. Development of the car wash and shopping plaza

The car-wash and shopping-plaza parcels were originally a single parcel acquired by B & J Investment Company in 1988. Appellant's Appendix 44a (hereinafter, "App.-a"). B&J Investment was owned by James Zyrowski (who now owns the shopping plaza) and his father. *Id.*; 11/21/14 Trial Tr, p 22, App. 20b. That same year, B&J split the parcel in two and started building the car wash. App. 44a. B&J sold the shopping-plaza parcel to Marlette Development Corp., reserving no easements whatsoever for ingress or egress across the shopping-plaza parcel. *Id.* At the time, B&J intended that the car wash would be accessed from a road on its north side (variously known as Plaza Drive, Euclid Street, and Enterprise Drive), and B&J installed a sign directing access from the north, i.e., from Enterprise Drive. 11/21/14 Trial Tr, pp 23–25, App. 21b-23b.

In 2000, the Village of Marlette closed the car wash entrance from Enterprise Drive. App. 44a. B&J then installed truck-wash bays on the site's northwest side, and vehicles entered the car wash from M-53 and the shopping plaza. 11/21/14 Trial Tr, pp 25–26; 31, App. 23b-24b; 26b. Critically, Mr. Zyrowski believed that B&J had permission from Marlette Development to use the parking lot. *Id.* at 32–34, App. 27b-29b. Consistent with that belief, Marlette Development never asked B&J to share in the parking lot's cost of upkeep for the duration of B&J's ownership of the car wash. *Id.* at 26, App. 24b.

## III. B&J sells the car wash

B&J sold the car-wash parcel to Lipka Investments in 2005. App. 45a. At that point, it was not possible for a prescriptive easement to have been created,

because B&J customers had been using the parking lot as a primary entrance to the car wash for only five years (since 2000), not the 15 years Michigan law requires.

The deed conveying the car-wash parcel from B&J to Lipka did not include a description of the purported easement. 11/21/14 Trial Tr, p 11, App. 17b. And the purchase agreement between B&J and Lipka included an integration-or-merger clause that said the agreement was the entire contract between the parties; there were no other written or oral understandings. *Id.* at 11–12, App. 17b-18b; Trial Ex 31. Although Mr. Zyrowski told Mr. Lipka that he had used the parking lot to access the west end of the car wash, Mr. Lipka admits that he “*wasn’t* led to believe there was an easement by him.” *Id.* at 16 (emphasis added), App. 19b.

Lipka Investments defaulted on its loan obligations and conveyed its interest to Tri-County Bank via a Deed in Lieu of Foreclosure in July 2006. App. 45a. Tri-County Bank then quitclaimed its interest in the parcel to GLCW, LLC, a property holding entity of the Bank. *Id.* Finally, GLCW conveyed its interest to Plaintiff Auto Wash in August 2006 via a Lease Agreement and Agreement of Purchase and Sale. *Id.* Again, the conveyance deed contained no description of the disputed acreage, and there was no evidence at trial of any parol statements related to the Lipka Investments, Tri-County Bank, or GLCW conveyances.

#### **IV. Auto Wash’s lease and purchase of the car wash**

Auto Wash is owned by Mr. Steven Kohler and Mr. Wayne Whiting. 11/20/14 Trial Tr, p 83, App. 3b. Before leasing the car-wash property, Auto Wash and Tri-County Bank discussed the lease for roughly eight months. *Id.* at 85, App. 4b. Auto

Wash was a sophisticated purchaser of commercial properties. *Id.* at 92, App. 7b. For example, when Auto Wash purchased Kohler's Propane North in Bad Axe, Michigan, it purchased the property with a driveway easement, *id.* at 91–92, App. 6b–7b, so Mr. Kohler was familiar with how easements work and are acquired, *id.* at 92, App. 7b. There was no testimony from Mr. Kohler about any attempt to identify an easement for the car-wash parcel.

For his part, Mr. Whiting had a quarter-century of experience in car-wash ownership and understood the importance of efficient access. *Id.* at 112, App. 11b. Although he had used a lawyer to purchase a previous car wash, he chose not to do so when buying the car wash at issue here. *Id.* at 112–113, App. 11b–12b. Both Messrs. Whiting and Kohler inspected the subject property with representatives of Tri-County Bank and GLCW, yet never inquired about easements or access, either before leasing or purchasing the car-wash parcel. *Id.* at 94, 113, App. 8b, 12b. Mr. Whiting also admitted that he never reviewed the title policy. *Id.* at 114, App. 13b. In fact, he did not even remember *seeing* the title policy. *Id.*

Auto Wash's written lease with GLCW expressly provided that Auto Wash was taking the property on an "as-is," "where-is" basis, and that GLCW made no representation as to the property's suitability for use as a car wash. Ex C to Lease—Agreement of Purchase & Sale § 5.1, Trial Ex 27. Auto Wash expressly acknowledged that GLCW made no warranties or representations about the property, and that Auto Wash was not relying on representations or warranties except as provided in the agreement, which said nothing about an ingress/egress easement. *Id.* §§ 10.1, 10.2. As noted above, the warranty deed that conveyed

GLCW's ownership in the property to Auto Wash did not include a description of the disputed acreage or refer to an easement of any sort. Trial Ex 22.

## V. Van Dyke's purchase of the shopping plaza

Van Dyke, which is owned by Mr. Zyrowski, purchased what was then the vacant shopping plaza from Marlette Development in 2013. App. 45a. Van Dyke repaired the property and re-opened the business in November 2013. *Id.* The shopping plaza is busy, averaging 8,000 customers a week, and parking is at a premium. 11/21/14 Trial Tr, p 54, App. 30b. Unsurprisingly, Van Dyke is looking to develop additional parking. *Id.* at 54–55, App. 30b-31b.

Shortly after reopening the shopping plaza, Van Dyke approached Auto Wash and asked it to contribute towards parking lot overhead and a possible lease of a portion of the parking lot for \$1,500 per month. 11/20/14 Trial Tr, pp 96-97, App. 9b-10b. Van Dyke also asked for a formal lease agreement. *Id.* at 116, App. 14b. Mr. Kohler got angry, said the request was “bullshit, there was no f\*ucking way I was gonna pay him that,” and walked away. *Id.* at 89, App. 5b. Mr. Whiting admits that Auto Wash never responded with a proposal or counter-offer. *Id.* at 117–118, App. 15b-16b.

## VI. The dispute

The following month, heavy snows accumulated on both the car-wash and shopping-plaza properties. Van Dyke paid to have some of the snow removed from the shopping-plaza parking lot to another location. App. 45a. But Auto Wash pushed the snow from its car-wash property *onto Van Dyke's property*. *Id.* Van

Dyke then pushed the snow back to the edge of the shopping-plaza parking lot, preventing entrance to the car wash from the parking lot. App. 46a. Auto Wash responded by filing this lawsuit, seeking injunctive relief and damages under three theories, now narrowed solely to a claim for prescriptive easement. *Id.*

## PROCEEDINGS BELOW

### I. Trial Court proceedings

The trial court began by noting that to obtain a prescriptive easement, it was Auto Wash's burden to prove 15 consecutive years of adverse possession. App. 46a. The trial court then held that Auto Wash met its burden by "tacking" on the possessory period of B&J, which purportedly used the parking lot continuously for ingress and egress from 1989 until 2005. App. 46a.

In so holding, the trial court made no findings of fact with respect to whether B&J's and Marlette's mutual use of the parking lot constituted an "adverse" or "hostile" use by B&J, and it ignored completely Mr. Zyrowski's unrebutted testimony that B&J had used the parking lot mutually with Marlette Development and with Marlette's permission. The trial court also did not address the testimony that B&J primarily used the car-wash parcel's *north* entrance—not the parking lot—for accessing the car wash until 2000, when the Village closed Enterprise Drive and B&J built the truck-wash bays, significantly changing B&J's use of the parking lot.

Instead of analyzing the legal requirements for prescriptive easements, the trial court invoked its own gut sense of equity. App. 48a ("Equity does that which ought to be done."). B&J was owned by Mr. Zyrowski, used the parking lot, and

never paid anyone for that use, said the trial court, so Van Dyke, also owned by Mr. Zyrowski, was duty-bound to allow Auto Wash to use the shopping-plaza parking lot and not pay anything for it, too. *Id.* (“subsequent Car Wash owners, *as a matter of equity*, should be entitled to the same use of the parking lot property as was the Defendant’s principal”) (emphasis added).

## II. Court of Appeals proceedings

The Court of Appeals took a more principled approach. It noted that under well-established Michigan law, tacking only applies when a current owner claiming an adverse use can show privity of estate with a previous owner who engaged in the same use. App. 51a (citing *Killips v Mannisto*, 244 Mich App 256, 258–259; 624 NW2d 224 (2001)). “This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance.” *Id.* (citing *Killips*, 244 Mich App at 259). Auto Wash cannot satisfy either of these two methods for showing privity. App. 51a–52a.

The Court of Appeals expressly rejected Auto Wash’s argument that it could rely exclusively on B&J’s ownership of the car-wash parcel to prove that a prescriptive easement had vested. App. 52a. “[T]he person claiming a prescriptive easement must acknowledge or act on the purported acquired [prescriptive-easement] right” for the easement to be created. *Id.* (citing *Gorte v Dep’t of Trasp*, 202 Mich App 161, 168; 507 NW2d 797 (1993)). And Auto Wash “fails to cite any legal authority in support of its argument that privity of estate need not be shown after

the 15-year statutory period is met at any time and by any previous owner because the owner of the servient property automatically 'loses his title when the statute of limitations expires.'" *Id.*

This Court granted leave to appeal on March 22, 2017, asking the parties to address whether a secret prescriptive easement can vest in the absence of any legal action by the owner of the dominant estate. 3/22/17 Order.

## STANDARD OF REVIEW

Van Dyke agrees with Auto Wash that whether “a prescriptive easement was created under the facts as found by the trial court, and whether it ran with the dominant estate without regard to whether legal action is taken to claim the easement, are questions of law reviewed *de novo*. See *People v Knight*, 473 Mich 324, 328; 701 NW2d 715 (2005).” Auto Wash Br, p 9.

## ARGUMENT

**I. Creation of a prescriptive easement requires (1) a property owner with the right to claim the easement, and (2) legal action. Neither prerequisite is met here.**

**A. B&J never had the right to claim a prescriptive easement.**

Auto Wash is correct that this “Court’s order granting leave encompasses two issues,” the first being “whether open, notorious, adverse, and continuous use of property for the prescriptive period creates an easement appurtenant.” Auto Wash Br, p 9. But Auto Wash then fails to answer that first question by addressing whether B&J even had the right to claim a prescriptive easement in 2005. For two independent reasons, B&J did not have that right.

First, there is no evidence in the record—and no fact-finding from the trial court—indicating that B&J’s use of the parking lot from 1989 to 2005 was adverse to Marlette Development. The parking lot was mutually used by both parties and, lacking any natural boundaries or enclosures, it would have been inherently difficult to determine if any car’s use of the parking lot was hostile, such that Marlette Development would have had the right to treat the driver as an intruder.

All the record evidence suggests that B&J's use was permissive, *not* adverse. Indeed, Mr. Zyrowski's was the only testimony on this critical point, and he believed that B&J had permission to use the parking lot from Marlette Development. 11/21/14 Trial Tr, pp 32–34, App. 27b-29b. That belief was consistent with the fact that Marlette Development never requested that B&J share in the parking lot's maintenance or other costs, as would be typical if B&J held some sort of easement, by prescription or otherwise. *Id.* at 26, App. 24b (never “asked by the owner of the parking lot to make a contribution”); *id.* at 27, App. 25b (never a request to “share in the costs of snow removal or lighting expenses for the parking lot”).

Absent any proof that B&J's parking-lot use was adverse and hostile, rather than permissive, the trial court erred in suggesting that B&J's conduct established a prescriptive easement no later than 2005. *Williamson v Crawford*, 108 Mich App 460, 464–465; 310 NW2d 419 (1981) (“Mutual use of an area will not mature into a prescriptive easement until the mutuality has ended and the adverse and hostile use continues for the statutory period.” Because the “trial court did not make specific findings of fact on the record,” it was “impossible from the record to determine if the prescriptive easement ha[d] been established.”); *Churches v Ruttman*, 2006 WL 1360393, at \*2 (Mich Ct App, May 18, 2006) (“Defendants, as the party claiming a prescriptive easement, have the burden of proof as to” proving an adverse and hostile use. “Although the evidence of permission is circumstantial and weak, there is *no* evidence tending to show a lack of permission. . . . Therefore, viewing the evidence in the light most favorable to defendants, defendants fail to show that their claim could be supported by evidence produced at trial.”).

The trial court's failure to make the necessary findings is particularly egregious given that B&J and Marlette Development *mutually* used the shopping-plaza parking lot during the time of B&J's ownership of the car-wash parcel. Indeed, the situation is indistinguishable than the scenario presented to and decided by this Court in *Hopkins v Parker*, 296 Mich 375; 296 NW 294 (1941). There, the plaintiffs filed an action to enjoin the defendant's use of the plaintiffs' property as a driveway. The defendant cross-claimed for a prescriptive easement, and the trial court ruled in favor of the defendant.

This Court reversed. As in the present case, the record showed that the driveway "originated as a convenience common to the needs of both properties and without thought on the part of the users of any claim of exclusive right thereto." *Id.* at 379. This Court held that a "prescriptive easement does not arise out of a mutual use of a driveway until mutuality ends and adverse user commences and continues for the period essential to the fastening of such a right." *Id.* "If the use[ ] was permissive[, ] such permissive character will continue of the same nature and no adverse use[ ] can arise until there is a distinct and positive assertion of a right *hostile to the owner and brought home to him.*" *Id.* (emphasis added).

"Evidence of adverse use[ ] must be clear," this Court said. *Id.* at 380. And on the record, it was simply "not conceivable" that the defendant "was asserting or even had the thought of adverse use[ ] of the driveway." *Id.* Accordingly, the Court entered judgment for the plaintiffs and permanently enjoined the defendant from interfering with the plaintiffs' exclusive right to their premises. *Id.* Accord, e.g., *Barbaresos v Casaszar*, 325 Mich 1, 8; 37 NW2d 689 (1949) (quoting *Hopkins*).

Similarly, in *Reed v Soltys*, 106 Mich App 341; 308 NW2d 201 (1981), the plaintiffs sought an injunction to prevent the defendants, adjoining landowners, from constructing a fence and making other improvements to a driveway that straddled their mutual boundary line. The trial court granted the plaintiffs their requested relief, concluding that “a prescriptive easement had arisen when the parcels were held by previous owners, noting that the common driveway had been used for upwards of 50 years and that the defendants had failed to prove that the mutual use was always permissive.” *Id.* at 345–346.

The Michigan Court of Appeals reversed. The only testimony regarding the driveway’s use was that the previous owners “were good friends and that each used the driveway as needed with mutual permission.” *Id.* at 347. In fact, “use of the driveway had been mutually permissive up until the present dispute.” *Id.* And mere “[a]cquiescence for a long term of years between adjoining owners in mutual use of a driveway does not create title in either party for the reason that the use is not hostile or adverse.” *Id.* (citing *Wilkinson v Hutzel*, 142 Mich 674, 676–677; 106 NW 207 (1906), and *Milewski v Wolski*, 314 Mich 445; 22 NW2d 831 (1946)). Accord, *e.g.*, *Worden v Assiff*, 317 Mich 436, 439; 27 NW2d 46 (1947) (“Mutual use [of a driveway] was a convenience for all, and consented to. Such use is not adverse, hostile, and does not ripen into a prescriptive easement.” Adjoining owners’ “acquiescence for a long term of years in such mutual use[ ] of the way did not create title in and to the land of the other in either party; there being nothing hostile or adverse in such use[.]”) (citing *Wilkinson*, 142 Mich at 676–677).

So too here. From the time B&J opened the car wash, it mutually used the shopping-plaza parking lot with Marlette Development. Cars moved freely across both properties, as the record reflects: “patrons of the car wash cross[ed] over into the shopping center and use[d] that parking lot,” and “patrons of the shopping center cross[ed] over into the car wash and utilize[d] it.” 11/21/14 Trial Tr, p 31, App. 26b. And Mr. Zyrowski believed that B&J’s use was with permission. 11/21/14 Trial Tr, pp 32–34, App. 27b-29b. Such mutual—and mutually agreeable—use by B&J is hardly the type of adverse and hostile use necessary to create a prescriptive easement. There is nothing in the record that Marlette Development ever treated B&J customers as trespassers on the shopping-plaza parking lot or *vice versa*. Nor is there evidence that B&J’s use was hostile and “brought home” to Marlette Development. All the facts and circumstances bespeak permissive mutual use, just like this Court’s decision in Hopkins.

Tellingly, Auto Wash conceded the permissive-use point repeatedly in the trial-court proceedings. During opening statements, Auto Wash’s counsel read to the trial court a portion of Mr. Zyrowski’s affidavit, acknowledging that after the north drive was eliminated, “the carwash was accessed from M-53 Main Street, *by permission from the Marlette Development Corporation* through the shopping center parking lot.” 11/20/14 Trial Tr, p 11 (emphasis added), App. 1b. Again, a little later in the same opening statement, Auto Wash’s counsel argued that B&J Investment had acquired a prescriptive easement because for 15 years, it “used Marlette Develop[ment] Corporation property for access *with permission*.” *Id.* at 13 (emphasis added), App. 2b.

Auto Wash's counsel continued, "the exact date is unknown, but *permission was granted* shortly after Marlette Development Corporation completed the parking lot." *Id.* (emphasis added). Counsel for Auto Wash even identified the Marlette Development agent who gave permission to B&J Investment to use the parking lot to access the car-wash parcel, as well as the timeframe when that permission was granted: "*Oral permission was provided* by James O'Morrow after Marlette Development completed construction of the shopping center." *Id.* (emphasis added).

In sum, there is no dispute that B&J Investment customers used the parking lot to access the B&J car wash. But there is also no dispute that B&J's use was with Marlette's permission; there is nothing in the record to the contrary. Given those circumstances, B&J could not have acquired a prescriptive easement by adverse possession, so Auto Wash's claim to a prescriptive easement fails.

Second, there is no record evidence that B&J used the shopping-plaza parking lot in the same, continuous manner from 1989 until 2005. Quite the opposite, the use changed significantly in 2000. As initially constructed, the car wash's primary entrance was the north side road, consistent with the property's signage. 11/21/14 Trial Tr, pp 23–25, App. 21b-23b (the access road variously called Plaza Drive, Euclid Street, and Enterprise Drive was "intend[ed] to be the entrances and exits for the car wash"; signage on the north road indicated "Car wash enter"). Before 2000, B&J's customers would have used the parking lot only incidentally, because the car-wash entrance was on the north side, both by design and by signage. It was "after this access was closed down [that] vehicles actually

c[a]me through the parking [to] access the car wash.” 11/21/14 Trial Tr, p 31, App. 26b.

That change occurred because, in 2000, the north entrance was blocked off and B&J constructed new truck-wash bays on the north side of the parcel. App. 44a. These changes necessitated that the car wash be accessed primarily *through* the shopping-plaza parking lot. 11/21/14 Trial Tr, p 31, App. 26b. The end result was to significantly expand B&J’s use in two ways: (1) increased traffic flow because of the new wash bays, and (2) increased use of the shopping-plaza parking lot because of the north entrance’s closure. Accordingly, even if there was some evidence that B&J’s use of the parking lot was adverse and hostile rather than permissive in 1989 (and there is no such evidence), there could be no prescriptive easement for the post-2000 use until *that use* was hostile and adverse for an additional 15 years. 1 Cameron § 6.23, p 235 (“An easement also may not be made more burdensome or have its use or purpose altered.”) (citing *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1957); *id.* (“[I]f an easement is granted for the purposes of brining automobiles into and out of a parcel of property, it may not be expanded to bring trucks in and out of that property.”) (citing *Crew’s Die Casting Corp v Davidow*, 369 Mich 541; 120 NW2d 238 (1963)).

From the time B&J’s use of the shopping-plaza parking lot changed in 2000 until B&J sold the property in 2005, only five years elapsed. And as all parties agree and the Court of Appeals held, Auto Wash cannot “tack” those five years to its own or any intervening use because it lacks privity with B&J. Again, Auto Wash’s claim to a prescriptive easement fails as a matter of law.

**B. B&J never took legal action to claim a prescriptive easement.**

If Auto Wash had introduced record evidence that (1) B&J's use of the parking lot was actually adverse rather than mutual and permissive, and (2) B&J's use of the parking lot did not change from 1989 to 2005, then this Court would have to decide whether that use created a secret prescriptive easement that lurked behind the chain of title until Auto Wash's filing of this litigation sprung that easement to life. For legal and practical reasons, the answer to that question would have to be answered no.

While a prescriptive easement vests when the 15-year statutory period expires, rather than when an action is brought, *Matthews v Dep't Nat Resources*, 288 Mich App 23, 36; 792 NW2d 40 (2010), the person claiming the right to the easement must still take some action to activate that right. App. 52a (citing *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993)). Otherwise, the law would be recognizing a secret easement not apparent to any purchaser of the dominant or servient estate or to a title examiner. The whole notion of a prescriptive easement is that, because the use is adverse and notorious, the owner of the subservient estate can take action to prevent that use from ripening into an easement. That logic does not apply to a secret easement, which leaves a purchaser of the subservient estate with no protection at all. And because, under Auto Wash's theory, the duration of the secret period is indefinite, the secret prescriptive easement can spring to life 10, 20, or even 100 years after its purported creation.

Take the facts here. If B&J had filed suit in 2005 and persuaded a court to grant a prescriptive easement, then any subsequent purchaser of the Marlette Development property would have been on notice of the easement's existence. In the absence of such action, *no* subsequent purchaser or title company is on notice. And that includes Van Dyke. Although Mr. Zyrowski, Van Dyke's owner, was obviously aware of the parking lot's use to access the car wash, he purchased the shopping plaza property reasonably believing that the use was mutual and permissive and therefore could be terminated at any time.

Worse yet, consider the hypothetical set forth in the Introduction to this brief. Fifty years after the fact and on the flimsiest of records, a purchaser could be subjected to a secret easement "created" many decades prior and have no practical ability to defend against the action. That has never been Michigan law.

*Matthews* is not to the contrary. There, the Court of Appeals allowed the present owners to "tack" the hostile use of their predecessors-in-interest because the present owners were related to and/or had actually used the disputed property of the predecessors. *Id.* at 41. *Matthews* was "not a case of an arms-length, third-party transfer," *id.* at 40, as is the case here. Moreover, the defendant in *Matthews* did "not dispute that the landlocked property owners ha[d] met the requirements of showing that their use was open, notorious and adverse." *Id.* at 37. The exact opposite is true here. See Also Real Property Law Amicus Brief, p 10 (analyzing *Matthews* and citing with approval its extension of the privity concept to property "predecessors and successors [who are] intimately acquainted").

As the Michigan Real Property Law Section explained in its *amicus* brief, the manner in which the Court of Appeals correctly analyzed the present case is the same analysis “applied in virtually every prescriptive easement case decided by the Michigan courts.” Real Property Law Amicus Br, p 6. Conversely, adopting Auto Wash’s position “would completely undermine the long line of cases . . . requiring the claimant to show that *he* [not a predecessor] can satisfy all of the elements required for a prescriptive easement including continues use for 15 years.” *Id.* (citing *Siegel v Renkiewicz*, 373 Mich 421, 425; 129 NW2d 876 (1964), and *Killips v Mannisto*, 244 Mich App 256; 624 NW2d 224 (2001)).

The Real Property Law Section’s *amicus* brief also distinguished Auto Wash’s cited cases on their facts. *Id.* at 7. Some of those cases apply a presumption of a prescriptive-easement grant when the adverse use continues “beyond the statutory period by *many* years,” in which case the burden shifts to the owner of the servient estate to show the use was merely permissive. *Id.* (citing *Beechler v Bylerly*, 302 Mich 79, 83; 4 NW2d 475 (1942); *Haab v Moorman*, 332 Mich 126, 144; 50 NW2d 856 (1952); *Berkey & Gay Furniture Co v Milling Co*, 194 Mich 234; 160 NW 648 (1916), and *Wortman v Stafford*, 217 Mich 554; 187 N 326 (1921)). As the Section explained, those decisions “should not be enlarged and extended . . . to provide that a prescriptive easement is established automatically and becomes an appurtenance upon expiration of the 15 year statutory period.” *Id.* at 9. (Even if applicable, such that the burden shifted to Van Dyke to show permissive use, Van Dyke satisfied that burden by offering evidence that B&J’s use of the parking lot was both mutual and permissive for the duration of its ownership.)

In other cases, such as *Matthews* and in *Gorte*, the distinguishing fact was that the right to a prescriptive easement “*had vested in the claimant*, not . . . *in the claimant’s predecessor in title*.” Real Property Law Section Br, p 12. That is why the inquiry “is properly limited to when the right vested in *the claimant*, not his predecessor who did not assert a claim.” *Id.* at 12–13 (analyzing the holdings in *Matthews* and *Gorte*).

Auto Wash’s contrary arguments do not withstand scrutiny. For example, Auto Wash relies on this Court’s decision in *Haab*. Auto Wash Br, pp 11-12. But that decision is one that the Real Property Law Section correctly distinguished as a “many years” case.

Auto Wash also relies heavily on this Court’s decision in *Smith v Dennedy*, 224 Mich App 378; 194 NW 998 (1923). Auto Wash Br, p 13. But *Dennedy* is yet another example where the claimant was seeking to establish that a prescriptive easement had vested *in the claimant*, not in some predecessor-in-interest. The same is true of Auto Wash’s *Sallan Jewelry Co v Bird*, 240 Mich 346; 215 NW 349 (1927), see *id.*, where the claimants asserted 15 years of adverse use by themselves and their father.

Auto Wash tacitly concedes that *Dennedy* is different because the claimant asserted that the easement vested in him rather than a predecessor, but dismisses that fact as “beside the point.” *Id.* But the identity of the claimant is the point. As the Court of Appeals recognized below, Auto Wash failed “to cite *any* legal authority in support of its argument” that prescriptive easements are automatic and do not require the current owner to show privity. App 52a (emphasis added).

Auto Wash next relies on a series of adverse-possession cases, none of which wrestled with the question presented here. Auto Wash Br, pp 14–15 (numerous citations omitted). Rather than analyze the facts of any of these cases, Auto Wash instead bounces back to *Gorte* for the generic proposition that adverse possession vests “when the period of limitation expires, not when an action regarding the title to the property is brought.” *Id.* at 15 (quoting *Gorte*, 202 Mich App at 168–169). But again, *Gorte* was a case that involved a claimant asserting that a prescriptive easement vested in him; it did not involve a claimant asserting that a prescriptive easement vested in a predecessor-in-title. Real Property Law Section Br, pp 12–13. Auto Wash cites no cases standing for the latter proposition in the context of adverse possession, either.

Finally, Auto Wash relies on five non-Michigan cases that *do* vest a prescriptive easement in the claimant’s predecessor-in-title. Auto Wash Br, pp 16–18 (citing *Johnson v Debusk Farm, Inc*, 636 SE2d 388 (Va, 2006); *Fesperman v Grier*, 313 So 2d 525 (Ala, 1975); *O’Conoor v Brodie*, 454 P2d 920 (Mont, 1969); *Clayton v Jensen*, 214 A2d 154 (Md, 1965), and *Cole v Bradbury*, 29 A 1097 (Me, 1894)). Not a single one of these opinions actually raises or discusses the question presented here. In *Johnson*, *Fesperman*, *O’Connor*, and *Cole*, the courts simply applied a prescriptive-easement analysis to a predecessor-in-title; there was no apparent objection raised by the owner of the subservient estate as to whether doing so was proper, nor was the issue decided. *Johnson*, 636 SE2d at 391; *Fesperman*, 313 So 2d at 527; *O’Connor*, 454 P2d at 924–925; *Cole*, 29 A 1097–1098. And in *Clayton*, the court reached the same result through tacking. 214 A2d at 344.

So Auto Wash is left advancing its secret prescriptive easement theory lacking the support of a single case, either within or without Michigan. That lack should not be surprising; courts do not favor the creation of secret property rights that spring into being many years after the fact and without any action by the party that originally possessed the right. Adopting such a rule will permanently unsettle property owner rights, which is presumably why no court has done so.

The Michigan Bankers Association submitted an *amicus* brief at the application stage, citing black-letter law that a vested prescriptive easement passes to a mortgagee and subsequent purchasers in a foreclosure sale. MBA Br, pp 5–7. Van Dyke does not disagree with that generic proposition; if B&J had filed suit and established a prescriptive easement in 2005, there is no question that easement would have passed to Lipka Investments and its mortgagee, Tri-County Bank. But that generic rule does not decide the question presented: did B&J use become a prescriptive easement in 2005 with *no* action by B&J? And as described at length above, there is no case or rule that stands for that proposition.

The Association complains that the Court of Appeals’ decision “imposes an unreasonable burden on mortgage lenders and undermines their right to foreclose.” MBA Br, pp 7–10. But it is difficult to see how that could be so, given that Michigan has never recognized the secret prescriptive easement rule that Auto Wash advocates. No financial institution should ever act “on the basis of the apparent ownerships suggested by the actual uses of the land.” *Id.* at 7. Like Auto Wash itself, a mortgage lender can and should take formal, *legal* steps to ensure it understands precisely what property rights it is receiving in return for a loan.

It was the failure to take such steps that put Auto Wash in this position in the first place. Its sophisticated owners understood what easements are and how to obtain them. Yet they (1) chose not to examine the chain of title for an ingress/egress easement, (2) did not ask the Bank or GLCW if such an easement existed, (3) chose not to retain a lawyer to look into the matter, and (4) accepted the property pursuant to a Lease Agreement and Agreement of Purchase and Sale—written by the Bank’s property-holding company—that specifically *disclaimed* any representations about the property’s status or use. This Court should decline the invitation to bail Auto Wash out of its predicament by rewriting Michigan law to recognize secret prescriptive easements.

Finally, the Michigan Bankers Association argues that creating a secret prescriptive easement “does no real harm to servient estate owners or title insurers.” MBA Br, pp 10–11. That is incorrect. The record shows that Van Dyke purchased the shopping plaza believing that Auto Wash’s ingress/egress easement was permissive. As a result, that easement could be revoked at any time. That is why, shortly after the purchase, Van Dyke approached Auto Wash about executing a lease for the easement. 11/20/14 Trial Tr, pp 96–97; 116, App. 9b-10b, 14b. Imposing a secret easement would defeat Van Dyke’s investment-backed expectations for the property and likely give rise to a claim by Van Dyke against his title insurer. That is a “real harm,” one that would also be imposed on any bank or credit union that loaned Van Dyke the money necessary to purchase the shopping plaza. The Association’s pooh-poohing of that harm does not justify its imposition.

**II. Auto Wash’s rejection of its responsibilities to repair and maintain the easement is a rejection of the easement itself. Alternatively, and at a bare minimum, Auto Wash must share in the costs going forward.**

“The owner of the dominant tenement must repair and maintain the easement for his or her use, and the owner of the servient tenement is under no obligation to do so.” 1 Cameron § 6.24, p 237 (citing *Moore v White*, 159 Mich 460; 124 NW 62 (1909); *Harvey v Crane*, 85 Mich 316; 48 NW 582 (1891)). And “when an easement is used jointly by the owners of the dominant and servient tenements,” as here, “the maintenance costs are to be paid in proportion to each party’s use.” *Id.* (citing *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191; 550 NW2d 850 (1996)).

Pursuant to these basic principles, if Auto Wash believed it had the right to a secret prescriptive easement at the time it obtained the car-wash property, Auto Wash was responsible in the first instance for repairing and maintaining the easement and for paying its proportion of the easement’s maintenance costs. Yet Auto Wash never took responsibility for its obligations, and when Van Dyke approached Auto Wash about contributing its fair share of those costs, Auto Wash’s co-owner said the request was “bullshit, there was no f\*ucking way I was gonna pay him that.” 11/20/14 Trial Tr, p 89, App. 5b. Auto Wash never returned to Van Dyke with a counter offer. *Id.* at 116–117, App. 14b-15b.

As a threshold matter, Auto Wash cannot disclaim all its obligations as the holder of a secret prescriptive easement and still assert a right to the easement itself. For that reason alone, its claims should be rejected and the Court of Appeals’ decision affirmed.

Alternatively, and at a bare minimum, this Court should compel Auto Wash to share in the maintenance costs for the parking lot going forward, including insurance, lighting costs, snow removal, upkeep, and repair. Under no circumstances should Auto Wash be allowed to use the easement but not pay for the incidental cost of that use, contrary to Michigan law.

### III. A postscript about preservation

In deciding this case below, the trial court and the Court of Appeals did not address whether Auto Wash satisfied its burden of proving that B&J's use of the parking lot was adverse and hostile, did not address whether Auto Wash satisfied its burden of proving that B&J's use was continuous in its present form for at least 15 years, and did not address Auto Wash's claim that it had a right to the secret prescriptive easement but no corresponding duty to pay expenses related to its use of the easement. To the extent these shortcomings were the result of Van Dyke failing to adequately address these issues, this Court should excuse them.

Michigan courts will overlook a preservation requirement if doing so "would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc.*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citing *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002)). This case satisfies not one but all three conditions.

The question whether Auto Wash proved that B&J had a right to a prescriptive easement as of 2005 is, as noted in the Standard of Review, a pure legal question, and the evidentiary record has been developed as capably as possible given the significant amount of time that has lapsed. The failure to hold Auto Wash to its burden of proof would result in manifest injustice and a bizarre determination in this case: a conclusion that Auto Wash has the ability to assert a secret prescriptive easement that vested in its predecessor-in-title, B&J, with no proof that B&J's use of the easement was actually adverse and hostile and of the same scope for at least 15 continuous years.

If the Court has any concerns about this point, then it should remand this case to the trial court for proper fact-finding on the basic elements of Auto Wash's claim of adverse possession. Auto Wash's failure to lay a proper factual foundation should not be rewarded by a judgment vesting it with substantial and valuable real-property rights and no corresponding obligations.

### **CONCLUSION AND RELIEF REQUESTED**

This Court should decline Auto Wash's invitation to issue the first decision in the country expressly holding that a property owner can rely on a predecessor-in-interest for a vested prescriptive easement where the predecessor never took any action with respect to that purported right. The Court can reach that result directly, simply by affirming the Court of Appeals. And or the Court can do so indirectly, either by holding that Auto Wash failed to prove that B&J's mutual use of the shopping-plaza parking lot was adverse, hostile, and continuous in scope for

the 15-year minimum period, or by holding that Auto Wash forfeited any right to the easement by disclaiming the obligations that accompanied the purported easement. Alternatively, the Court could simply deny Auto Wash's Application for Leave to Appeal. In no event should the Court hold that Auto Wash is entitled to a secret prescriptive easement based on the use of a predecessor-in-interest that Auto Wash never proved had satisfied the basic requirements for a prescriptive easement, and where all record evidence shows that predecessor's use to have been mutual to, and with the permission of, Marlette Development, the owner of the subservient estate.

Respectfully submitted,

John J. Bursch (P57679)  
BURSCH LAW PLLC  
9339 Cherry Valley Ave SE, #78  
Caledonia, Michigan 49316  
(616) 450-4235  
[jbursch@burschlaw.com](mailto:jbursch@burschlaw.com)

David A. Keyes (P43917)  
KELLY LAW FIRM  
627 Fort Street  
Port Huron, Michigan 48060  
(810) 987-4111

*Attorneys for Van Dyke SC  
Properties, LLC*

Dated: July 27, 2017